Disciplinary Complaints:
Procedures and Common Mistakes

JOHN S. NICHOLS
SUPREME COURT OFFICE OF DISCIPLINARY COUNSEL

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According to the Preamble to the Rules of Professional Conduct:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

Preamble: A Lawyer's Responsibilities, paragraph [10], Rule 407, SCACR. The "Scope" to the Preamble adds:

> Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law. . . .
>
> Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Preamble, *Scope*, paragraphs [3], [6], Rule 407, SCACR.

It is against this backdrop that the disciplinary system in South Carolina was born. These materials give a brief overview of that system. At the end are materials governing malpractice based upon violation of the RPC.

A. Disciplinary Procedures

Disciplinary procedures are largely found in the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR. These Rules define "misconduct" as follows:

> **(a) Grounds for Discipline**. It shall be a ground for discipline for a lawyer to:
>
> (1) violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers;
>
> (2) engage in conduct violating applicable rules of professional conduct of another jurisdiction;
>
> (3) willfully violate a valid order of the Supreme Court, Commission or panels of the Commission in a proceeding under these rules, willfully fail to appear personally as directed, willfully fail to comply with a subpoena issued under these rules, or knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response or appearance under Rule 19(b)(1), (c)(3) or (c)(4);
>
> (4) be convicted of a crime of moral turpitude or a serious crime;
>
> (5) engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law;
>
> (6) violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR;
>
> (7) willfully violate a valid court order issued by a court of this state or of another jurisdiction;
>
> (8) employ a person in violation of Rule 34;
>
> (9) willfully fail to comply with the terms of a finally accepted deferred disciplinary agreement or any terms of a finally accepted agreement for discipline by consent; and,
>
> (10) willfully fail to comply with a final decision of the Resolution of Fee Disputes Board.

Rule 7(a), RLDE. The RLDE also sets forth the sanctions available to the Supreme Court once misconduct has been established or admitted:

> **(b) Sanctions.** Misconduct shall be grounds for one or more of the following sanctions:
>
> (1) disbarment;
>
> (2) suspension for a definite period from the office of attorney at law. The period of the suspension shall not exceed 3 years and shall be set by the Supreme Court;
>
> (3) public reprimand;
>
> (4) admonition, provided that an admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of sanction to be imposed;
>
> (5) restitution to persons financially injured, repayment of unearned or inequitable attorney's fees or costs advanced by the client, and reimbursement to the Lawyers' Fund for Client Protection;
>
> (6) assessment of the costs of the proceedings, including the cost of hearings, investigations, prosecution, service of process and court reporter services;
>
> (7) assessment of a fine;
>
> (8) limitations on the nature and extent of the lawyer's future practice;
>
> (9) debarment (added 1/17/18);
>
> (10) any other sanction or requirement as the Supreme Court may determine is appropriate.

Rule 7(b), RLDE.

The rules provide a **right to counsel**:

> The lawyer shall be entitled to retain counsel and to have the assistance of counsel at every stage of these proceedings. The Commission may appoint counsel to represent the lawyer in incapacity proceedings. See Rule 28(b)(3)[cases involving allegations of incapacity]. After appearing as counsel for a lawyer in a matter under these rules, counsel for the lawyer may only withdraw upon leave of the chair or the

> vice chair of the Commission or the chair of the hearing panel after 10 days' notice to disciplinary counsel and the lawyer or, prior to formal charges having been filed, upon stipulation of the lawyer, the withdrawing counsel, and disciplinary counsel. Provided, after a matter has been forwarded to the Supreme Court for action, counsel can only withdraw from representation upon leave of the Supreme Court after due notice to the client and disciplinary counsel.

Rule 10, RLDE. There also a prohibition against *ex parte* contact with the Commission or Commission counsel. Rule 11, RLDE.

Confidentiality and disclosure are governed by Rule 12, RLDE, which essentially provides that even the existence of a complaint is confidential until a Panel of the Commission authorizes formal charges. This rule is further protected by the availability of a protective order. Rule 12(e), RLDE. There is a provision for waiver and for permissive disclosure by Commission order. Rule 12(c), RLDE. Also, disclosure may be made in aid of withdrawal of counsel, Rule 12(d), RLDE, or in aid of Lawyer Helping Lawyers. Rule 12(h), RLDE.

The procedures before ODC and the Commission are set forth in remaining rules. These are outlined as follows:

1. Burden of Proof

The RLDE sets forth the applicable burdens of proof in disciplinary cases:

> Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel. The burden of proof in proceedings seeking reinstatement following disbarment, suspension or transfer to lawyer incapacity inactive status is on the lawyer by clear and convincing evidence.

Rule 8, RLDE. Therefore a higher standard applies, although it is not the criminal standard.

2. Pleading

Reports come to ODC in many ways and in many forms. ODC must "evaluate all information coming to disciplinary counsel's attention by complaint or from other sources…." to see if there are allegations of lawyer misconduct, incapacity, or "the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition." Rule 19(a), RLDE. If the information would not meet that test "if it were true," then the matter is dismissed (or where appropriate referred to another agency). However,

> If the information raises allegations that would constitute lawyer misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if true, disciplinary counsel shall conduct an investigation.

Rule 19(a), RLDE. This initial threshold is not very high.

ODC will then send out a Notice of Investigation and the lawyer has 15 days to respond. Rule 19(b), RLDE. Disciplinary counsel may extend that time for up to 30 days, Rule 14(b)(3), RLDE) and the Commission may then grant an additional period up to 30 days. Rule 14(b)(1), RLDE. Any further extension must be obtained from the Court based upon a showing of "good cause." Rule 14(b)(1), (4), RLDE.

DO NOT FAIL TO RESPOND.

I repeat - DO NOT FAIL TO RESPOND. Should you ignore the notice or fail to respond to the NOI, you will receive a *Treacy* letter, which is a reference to *Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982). There, the Supreme Court stated:

> The Respondent was granted the right to practice law in South Carolina by the Supreme Court. Both the Hearing Panel and the Executive Committee, as well as the Commission itself serve as arms of this Court. Failure to respond to any of these is the equivalent of a refusal to respond to the Supreme Court. We look with disdain upon the attitude of the Respondent towards those who were charged with the duty of investigating the Complaint of [the Complainant]. His lack of respect for constituted authority is consistent with his lack of understanding of his duty to his client. His action and lack of action in dealing with the Board of Commissioners is clearly misconduct unbecoming an attorney and is reason for sanction.

Id. at 517-518, 290 S.E.2d at 241-242. That is, the mere receipt of a *Treacy* letter is grounds for sanction even in the absence of a provable case of misconduct. Again, DO NOT FAIL TO RESPOND!

3. Notice of Investigation

The Rules also set forth a procedure governing the Notice of Investigation (NOI). Under the Rules:

> **(c) Requirements of Notice of Investigation.**
>
> (1) When issuing notice of investigation pursuant to Rule 19(b), disciplinary counsel shall give the following notice to the lawyer:
>
> > (A) a specific statement of the allegations being investigated and the rules or other ethical standards allegedly violated, with the provision that the investigation can be expanded if deemed appropriate by disciplinary counsel;
> >
> > (B) the lawyer's duty to respond pursuant to Rule 19(b);

(C) the lawyer's opportunity to meet with disciplinary counsel pursuant to Rule 19(c)(3); and,

(D) the name of the complainant unless the investigative panel determines that there is good cause to withhold that information.

(2) The investigative panel may defer the giving of notice but, when notice is deferred, disciplinary counsel must give notice to the lawyer before making a recommendation as to a disposition.

(3) Before disciplinary counsel or the investigative panel determines its disposition of the complaint under Rule 19(d), either disciplinary counsel or the lawyer may request that the lawyer appear before disciplinary counsel to respond to questions. The appearance shall be on the record and the testimony shall be under oath or affirmation. If disciplinary counsel requests the lawyer's appearance, disciplinary counsel must give the lawyer 20 days' notice.

(4) Any person giving testimony pursuant to Rule 19 shall be entitled to obtain a transcript of his or her testimony from the transcribing court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown.

Rule 19(c), RLDE.

4. Civil Procedure Rules and Discovery

Many of the rules applicable in civil cases apply in disciplinary cases. The RLDE provides:

Except as otherwise provided in these rules, the South Carolina Rules of Evidence applicable to non-jury civil proceedings and the South Carolina Rules of Civil Procedure apply in lawyer discipline, incapacity cases, and proceedings to determine whether a lawyer is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition when formal charges have been filed. The right to discovery, however, shall be limited to that provided by Rule 25.

Rule 9, RLDE.

The RLDE sets forth the available discovery and provides a schedule for completing discovery as follows:

(a) Initial Disclosure. Within 20 days of the filing of an answer, disciplinary counsel and respondent shall exchange:

(1) the names and addresses of all persons known to have knowledge of the relevant facts;

(2) non-privileged evidence relevant to the formal charges;

(3) the names of expert witnesses expected to testify at the hearing and affidavits setting forth their opinions and the bases therefor; and,

(4) other material only upon good cause shown to the chair of the hearing panel.

Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the lawyer. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request.

(b) Pre-Hearing Disclosure. Within 20 days of the date of the filing of an answer, the chair of the hearing panel shall set a date for the exchange of witness lists and exhibits no later than 30 days prior to the scheduled hearing. Disciplinary counsel and respondent shall exchange exhibits to be presented at the hearing, names and addresses of witnesses to be called at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded). Copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under Rule 25(h).

(c) Depositions. Depositions shall only be allowed if agreed upon by the disciplinary counsel and the respondent, or if the chair of the hearing panel or the chair's designee grants permission to do so based on a showing of good cause. The chair or the chair's

designee may place restrictions or conditions on the manner, time and place of any authorized deposition.

(d) Exculpatory Evidence. Notwithstanding any other provision of this rule, disciplinary counsel shall provide respondent with exculpatory evidence relevant to the formal charges.

(e) Duty of Supplementation. Both parties have a continuing duty to supplement information required to be exchanged under this rule.

(f) Completion of Discovery. All discovery shall be completed within 60 days of the filing of the answer.

(g) Failure to Disclose. If a party fails to timely disclose a witness's name and address, any statements by the witness, summaries of witness interviews, or other evidence required to be disclosed or exchanged under this rule, the hearing panel may grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate. In the event disciplinary counsel has not timely disclosed exculpatory material, the hearing panel may require the matter to be disclosed and grant a continuance, or take such other action as may be appropriate.

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the chair of the hearing panel. Review of these decisions shall not be subject to review by the hearing panel or to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

(i) Pre-Hearing Conferences. The chair of the hearing panel may require the respondent and disciplinary counsel to participate in a pre-hearing conference in person or by telephone. Either party may request a pre-hearing conference. Scheduling of a pre-hearing conference is at the sole discretion of the chair of the hearing panel.

5. Disposition After the Investigation

The RLDE sets forth several possible outcomes after a NOI has been sent and the investigation completed. The Rules provide:

(1) Upon completion of the investigation, if disciplinary counsel believes that no misconduct has been committed, and a written caution is not appropriate to conclude the matter, disciplinary counsel may **dismiss the complaint**.

(2) If disciplinary counsel believes that no misconduct has been committed, but a written caution or warning is appropriate to conclude the matter, disciplinary counsel may issue a **letter of caution**.

(3) If disciplinary counsel believes there is evidence supporting the allegations against a lawyer, disciplinary counsel may:

> (A) propose an agreement for discipline by consent to the lawyer pursuant to Rule 21;
>
> (B) recommend to an investigative panel that the matter be concluded with a letter of caution or a confidential admonition; or,
>
> (C) recommend to an investigative panel that formal charges be filed.

(4) The investigative panel may adopt, reject or modify the recommendations of disciplinary counsel.

> (A) If the investigative panel finds no violation or a violation pursuant to Rule 7 for which the imposition of a sanction is not warranted, it may dismiss or issue a letter of caution.
>
> (B) If the investigative panel finds that there is reasonable cause to believe the lawyer committed misconduct for which the imposition of a sanction is warranted, it may accept an agreement for discipline by consent pursuant to Rule 21; it may execute a deferred discipline agreement; it may admonish the lawyer pursuant to the provisions of Rule 19(d)(5) or, it may direct disciplinary counsel to file formal charges.
>
> (C) If the investigative panel finds that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the lawyer is deceased, disappeared, incarcerated, physically or mentally incapacitated, disbarred, or suspended from the practice of law, or for other good cause, the panel may designate the matter **closed but not dismissed**. If the lawyer files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed re-opened and in the investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be re-opened after being closed, but not dismissed, an investigative panel of the Commission must make a finding that

there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be re-opened. Before a motion can be considered by an investigative panel of the Commission to re-open a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to re-open on the lawyer and then the lawyer shall have 10 days to respond thereto. Disciplinary counsel shall notify both the lawyer and the complainant when a matter is closed, but not dismissed, and when the matter is re-opened. If the panel declines to re-open the matter, disciplinary counsel shall so advise the lawyer.

(5) When the investigative panel finds reasonable cause to conclude that the lawyer has committed misconduct, but finds that public discipline is not warranted, it may issue notice to the lawyer that it intends to impose a **confidential admonition** as a final disposition of the matter(s). Notice to the lawyer shall include a copy of the confidential admonition and shall be served on the lawyer in accordance with Rule 14(c). The notice of intent shall state the lawyer's right to object and that any such objection need not include any grounds therefor. The confidential admonition shall thereafter be imposed unless the lawyer both files with the Commission and serves on disciplinary counsel a written objection within 30 days of mailing of the notice. If the lawyer objects to the imposition of the confidential admonition in conformity with the requirements of this rule, disciplinary counsel shall file formal charges.

Rule 19(d), RLDE.

6. Formal Charges

Formal charges are not automatic. Rather, as set forth above, the Commission authorize (or direct) ODC to file formal charges. Rule 19(d)(4)(B), RLDE. The RLDE sets forth the requirements governing formal charges:

> The formal charges shall give fair and adequate notice of the nature of the alleged misconduct or incapacity. Disciplinary counsel shall file the formal charges with the Commission. Disciplinary counsel shall cause a copy of the formal charges to be served upon the respondent or respondent's counsel and shall file proof of service with the Commission.

Rule 22, RLDE.

7. Answer

The lawyer must then respond to the formal charges, and the RLDE spells out how to do so and the effect of raising certain defenses:

> **(a) Time.** The respondent shall file a written answer with the Commission and serve a copy on disciplinary counsel within 30 days after service of the formal charges, unless the time is extended by the hearing panel.
>
> **(b) Waiver of Privilege.** The raising of a mental or physical condition as a defense constitutes a waiver of any medical privilege pursuant to Rule 28(b)(8).

Rule 23, RLDE.

8. Failure to Answer; Failure to Appear

Whatever the case, do NOT go into default, and please show up! The RLDE sets forth the effect of either of these events:

> **(a) Failure to Answer.** Failure to answer the formal charges shall constitute an admission of the allegations. On motion of disciplinary counsel, the administrative chair may issue a default order setting a hearing to determine the appropriate sanction to recommend to the Supreme Court. The Commission shall notify the parties of the date and time of the hearing and shall permit them to submit evidence regarding aggravation and mitigation of sanction. A respondent held in default shall not be permitted to offer evidence to challenge the allegations contained in the formal charges deemed admitted by this rule.
>
> **(b) Failure to Appear.** If the respondent should fail to appear when specifically so ordered by the hearing panel or the Supreme Court, the respondent shall be deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance. Absent good cause, the hearing panel or Supreme Court shall not continue or delay proceedings because of the respondent's failure to appear. If the hearing panel determines that the respondent's failure to appear was willful, it shall immediately notify the Supreme Court, which may issue an order of interim suspension

pursuant to Rule 17(c). A willful failure to appear before a hearing panel or the Supreme Court may be punished as a contempt of the Supreme Court and may result in an order of interim suspension.

Rule 24, RLDE. ODC will work with lawyers but lawyers must also work with ODC. This office does not take default lightly and will do all that we can to avoid seeking default or trial in absence. Please do not put us in that position because the consequences can be terrible.

9. Hearing

Hearings before the Commission are governed by Rule 26, RLDE. The Rule provides:

(a) Scheduling. Upon receipt of the respondent's answer or upon expiration of the time to answer, the chair of the hearing panel of the Commission shall schedule a public hearing and notify disciplinary counsel and respondent of the date, time, and place of the hearing.

(b) Hearing Panel. The hearing shall be conducted by three or more members of the hearing panel of the Commission. See Rule 4(g).

(c) Conduct of Hearing.

(1) All testimony shall be given under oath or affirmation.

(2) Disciplinary counsel shall present evidence on the formal charges.

(3) Disciplinary counsel may call the respondent as a witness.

(4) Both parties shall be permitted to present evidence and produce and cross-examine witnesses.

(5) The hearing shall be recorded verbatim and a transcript shall be promptly prepared and filed with the Commission. A copy of the transcript shall be made available to the respondent at respondent's expense.

(6) Disciplinary counsel and the respondent may submit proposed findings, conclusions, and recommendations for dismissal, letter of caution, sanction(s), or transfer to lawyer incapacity inactive status to the members of the hearing panel who conducted the hearing.

(d) Submission of the Report. Within 60 days after the filing of the transcript, the hearing panel shall file with the Supreme Court the record of the proceeding and a

report setting forth a written summary, proposed findings of fact, conclusions of law, any minority opinions, and recommendations for dismissal, letter of caution, sanction(s), or transfer to lawyer incapacity inactive status. The hearing panel shall at the same time serve the report upon the respondent and disciplinary counsel.

(e) Combining Cases for Hearing. Upon motion of either party after 10 days' notice to the opposing party, the chair of the hearing panel may combine for hearing two or more formal charges pending against a lawyer which have not been heard or may reconvene to hear additional formal charges against a lawyer filed prior to the hearing panel issuing a panel report concerning formal charges against the lawyer already heard by that panel.

(f) Recommending Closed, but not Dismissed. If the hearing panel finds that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the respondent is deceased, disappeared, incarcerated, physically or mentally incapacitated, disbarred, or suspended from the practice of law, or for other good cause, the panel may dispense with the hearing and recommend to the Supreme Court that the matter be closed, but not dismissed. If the respondent files a written objection with the Supreme Court and serves a copy of that objection on disciplinary counsel within 10 days of service of the recommendation that the matter be closed, but not dismissed, the matter shall be remanded to the Commission and the panel will proceed with the hearing. Any objection need not contain any grounds for objecting. If no objection is filed and properly served in accordance with this rule, the Supreme Court shall issue its order declaring the matter closed, but not dismissed, and granting the investigative panel of the Commission the authority to re-open the matter on motion of disciplinary counsel pursuant to the provisions of Rule 19(d)(4)(C).

The Rule provides some flexibility but it contemplates formality. Be prepared to try the case just as you would any case before an administrative tribunal. Keep in mind the rules of evidence and the applicable rules of procedure. And most of all be respectful.

10. Supreme Court Review

The Supreme Court reviews the Commission's orders. The procedure is similar to ordinary appellate work, but different in some critical respects. The Rules governing review are as follows

(a) Briefs of Disciplinary Counsel and Respondent. Within 30 days of the service of the hearing panel report, disciplinary counsel and/or respondent may serve and file a brief setting forth and arguing any exceptions taken to the findings, conclusions or recommendations made by the hearing panel. Within 30 days after service of the brief, the opposing party may serve and file a brief in response. Within 15 days of the service of the response, the party who filed the brief containing exceptions may serve and file a reply brief. The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.

(b) Form, Content and Number of Briefs. The form and content of the briefs shall, to the extent possible, comply with the requirements of Rules 208 and 267, SCACR. The number of briefs to be served and filed shall be the same as that required for final briefs under Rule 211(a), SCACR.

(c) Supplementary Filings and Oral Argument.

(1) If the Supreme Court desires an expansion of the record or additional findings, it shall remand the case to the hearing panel with appropriate directions and withhold action pending receipt of the additional filing.

(2) The Supreme Court may order additional briefs or oral arguments as to the entire case or specified issues.

(d) Stay for Further Proceedings. If, during review by the Supreme Court, the Commission receives another complaint against the respondent, disciplinary counsel shall advise the Supreme Court. The Supreme Court may stay its review pending the Commission's determination of the second complaint. The Supreme Court may impose a single sanction covering all recommendations for discipline from the Commission against a respondent.

(e) Decision.

(1) The Supreme Court shall file a written decision dismissing the case, containing a letter of caution, imposing a sanction(s), or transferring the lawyer to incapacity inactive status. Any order relating to incapacity shall comply with Rule 28(b)(9). Unless otherwise ordered by the Supreme Court, the decision shall be effective upon filing.

(2) The Supreme Court may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission.

(3) The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct. Unless otherwise ordered by the Court,

costs shall be paid within 30 days of the filing of the opinion or order assessing costs.

(f) Rehearing. A petition for rehearing must be served and filed within 15 days after the filing of the decision or order.

(g) Recusal. A justice of the Supreme Court shall not participate in any proceeding involving allegations of misconduct or incapacity against the justice, or in any proceeding where recusal is required under the Code of Judicial Conduct.

(h) Notice of Decision. The Commission shall transmit notice of all public discipline imposed against a lawyer, transfers to and from incapacity inactive status, permanent resignations in lieu of discipline, and reinstatements to the National Discipline Data Bank maintained by the American Bar Association, the disciplinary enforcement agency of every other jurisdiction in which the lawyer is admitted, and the South Carolina Bar. The Commission shall transmit notice of a decision suspending or disbarring a lawyer, transferring a lawyer to incapacity inactive status, or ordering a lawyers' permanent resignation in lieu of discipline to the clerk of court in each county in which the lawyer maintained an office and the chief judge for administrative purposes having authority over any county in which the lawyer maintained an office. The Commission may also establish policies for giving notice of public discipline to other courts, agencies and organizations. The Commission shall not provide notice when an admonition is imposed.

Rule 27, RLDE.

11. Miscellaneous

There are other rules to review during the process. For instance, the Court has adopted a rule on "Reciprocal Discipline," which permits the Court to impose a sanction upon a lawyer who is licensed in South Carolina and is disciplined in another jurisdiction. Rule 29, RLDE. Furthermore, once a lawyer is suspended or disbarred, the lawyer must comply with notice provisions set forth in Rule 30, RLDE. And the rules governing receivership may come into play should the suspended or disbarred lawyer still have active clients or bank accounts. Rule 31, RLDE.

During a period of suspension, a lawyer may not work in any capacity in a law firm. Rule 34, RLDE. The exception to this rule is a very restrictive procedure permitted for the employment of a lawyer who is suspended for 9 months or less. Rule 34(b), RLDE.

The RLDE also permits Discipline by Consent, Rule 21, RLDE, and resignation in lieu of discipline. Rule 35, RLDE.

The RLDE provides the means for reinstatement following definite suspension of less than 9 months, Rule 32, RLDE, as well as following a suspension of more than 9 months or disbarment. Rule 33, RLDE.

The RLDE mandates a self-report by a lawyer charged with or convicted of a serious crime as defined by Rule 2(aa), RLDE. See Rule 16, RLDE.

Finally, although not formally adopted in SC, the ABA has promulgated rules governing lawyer discipline, including rules setting forth factors for mitigation. Our Court has viewed them favorably and the Commission permits presentation of evidence under those rules. See *Matter of Jordan*, 421 S.C. 594, 809 S.E.2d 409 (2017) (quoting *ABA Ann. Standards for Imposing Lawyer Sanctions* 9.32 (Am. Bar Ass'n 2015)).

B. Common Mistakes

The most common mistakes lawyers make that lead to a report to ODC include:

Failure to Communicate (Rule 1.4)

Failure to Exercise Diligence (Rule 1.3)

Engaging in Conflicts of Interest (Rules 1.7-1.13)

Failing to Keep Property Safe (Rule 1.15)

Failing to properly terminate representation (Rule 1.16)

Failure to properly supervise lawyers (Rule 5.2) or nonlawyers (Rule 5.3)

Violating Marketing Rules (Rules 7.1-7.4)

Failing to follow Trust Account Reconciliation Rules (Rule 417, SCACR)

These are the things that often get the attention of ODC.

The most common mistakes lawyers make when they receive a Notice of Investigation from ODC are:

Failure to Respond

The Rules mandate a response. The failure to do so will render the lawyer in default. This means you will be bound by allegations contained in the Notice and will not be able to adequately defend yourself.

Failure to Adequately Respond

The Response must adequately meet the notice. The best way to do this is to provide an introductory paragraph laying out relevant factual and procedural history and then itemizing the alleged sections of the RPC or RLDE with a specific admission or denial. Follow up with a concluding paragraph.

Failure to cooperate with Rule 25(b), RLDE disclosures

As noted above, Rule 25(b) requires some initial disclosures. Please provide these in a timely fashion. Otherwise, you may find witnesses or other evidence excluded. Rule 25(g), RLDE.

Failure to show up at a statement under oath

The RLDE provides "Before disciplinary counsel or the investigative panel determines its disposition of the complaint under Rule 19(d), either disciplinary counsel or the lawyer may request that the lawyer appear before disciplinary counsel to respond to questions. The appearance shall be on the record and the testimony shall be under oath or affirmation. If disciplinary counsel requests the lawyer's appearance, disciplinary counsel must give the lawyer 20 days' notice." Rule 19(c)(3), RLDE. This is NOT a deposition.

Furthermore, the lawyer may be subpoenaed to appear as part of the investigation. Rule 15(b)(1), RLDE.

The failure to comply with either of these provisions may result in an order of contempt from the Supreme Court.

Failure to show up at a Commission hearing

Please attend the hearing, unless you have an exceptional reason for not doing so. Otherwise, you will be deemed to have admitted EVERYTHING ODC puts before the

Commission, and to have conceded the merits of any motion or recommendation, including the sanction.

If the Commission finds the failure to appear was willful, then the Commission must notify the Supreme Court, and an order of interim suspension will likely follow. Rule 24(b), RLDE.

Failure to take exceptions to a Commission order

If there are no exceptions to the Commission order, then both parties are bound to the order in its entirety, including all recommendations. Rule 27(a), RLDE. And neither side may file a brief!

Take exceptions under the Rule, even if you intend to concede some points. This will permit the opportunity to brief things, such as items in mitigation, and to advocate for leniency.

Failure to show up at oral arguments

This would seem obvious, but it is not. Willful failure to appear before the Commission or the Supreme Court will result in being found in default, and will also likely result in a finding of contempt and an order of interim suspension. Rule 24(b), RLDE.

Please show up.

C. Ethics and Legal Malpractice

The concept of "Ethics and Legal Malpractice" lends itself to a discussion of the numerous rules governing the behavior of lawyers. Most of those rules are found in the RPC or other rules promulgated by the Court (*i.e.*, the RLDE, the rules governing the Resolution of Fee Disputes Board, Rule 417 governing trust accounts). At bottom, however, a violation of the RPC may or may not be relevant in a civil action for legal malpractice.

The Supreme Court summarized recently the rules governing legal malpractice as follows:

> In order to prevail in a cause of action for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession," *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000), and "[t]he standard to be applied in determining legal malpractice issues is statewide," *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 437–38, 472 S.E.2d 612, 614 (1996). Finally, generally, a plaintiff in a legal malpractice action must establish this standard of care by expert testimony. *Id.* at 435, 472 S.E.2d at 613.

Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). *See also Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002) (noting the general rule and adding that where the subject matter is of common knowledge or experience so that no special training is required to evaluate the defendant's conduct, expert testimony is not required); *Tuten v. Joel*, 410 S.C.

104, 763 S.E.2d 54 (Ct. App. 2014), cert denied 2015 (attorney may not unilaterally withdraw from representation without complying with applicable rules governing withdrawal, including notice to the client; attorney-client relationship remains until proper withdrawal).

The comments to the preamble to the RPC state that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." *Preamble: A Lawyer's Responsibilities*, Comment [7], Rule 407, SCACR. Comment [7] adds, however, "[n]evertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." *Id.*

The Supreme Court addressed this notion nearly two decades ago. In *Smith v. Haynsworth, Marion, McKay & Guerard*, the Court described the various ways courts around the country have addressed the issue:

> A majority of courts permit discussion of such a violation at trial as some evidence of the common law duty of care. *See Developments in The Law-Lawyers' Responsibilities and Lawyers' Responses*, 107 Harv.L.Rev. 1547, 1567 (1994). *See also* Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L.Rev. 281, 286-287 (1979). These courts generally rule that the expert must address his or her testimony to the breach of a legal duty of care and not simply to breach of disciplinary rule. *See* Ambrosio and McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 Temp. L.R. 1351, 1363 (1988). Other courts have held that ethical standards conclusively establish the duty of care and that any violation is negligence *per se*. Greenough, *The Inadmissibility of Professional Standards in Legal Malpractice After Hizey v. Carpenter*, 68 Wash.L.Rev. 395, 398-401 (1993) (hereinafter *Greenough*). A minority find that violation of an ethical rule establishes a rebuttable presumption of legal malpractice. *Id.* And, finally, a few courts hold that ethical standards are inadmissible in a legal malpractice

> action. *Id. See Hizey v. Carpenter*, 119 Wash.2d 251, 830 P.2d 646, 654 (1992); *Bross v. Denny*, 791 S.W.2d 416, 420 (Mo. Ct. App.1990).
>
> We concur with the majority of jurisdictions and hold that, in appropriate cases, the RPC may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action. However, we adopt the view taken by the Supreme Court of Georgia in *Allen v. Lefkoff, Duncan, Grimes & Dermer*, 265 Ga. 374, 453 S.E.2d 719, 721-722 (1995), as follows:
>
> > This is not to say, however, that all of the Bar Rules would necessarily be relevant in every legal malpractice action. In order to relate to the standard of care in a particular case, we hold that a Bar Rule must be intended to protect a person in the plaintiff's position or be addressed to the particular harm.

Smith v. Haynsworth, Marion, Mckay & Geurard, 322 S.C. 433, 436-437, 472 S.E.2d 612, 613614 (1996). The Court noted the theory behind the majority view "is that, since the ethical rules set the minimum standard of competency to be displayed by all attorneys, a violation thereof may be considered as evidence of a breach of the standard of care. *See Sommers v. McKinney*, 287 N.J.Super. 1, 670 A.2d 99, 105 (1996). Other courts admit this evidence in an analogous manner of admitting statutes, ordinances, or practice codes in defining the duty of care. *See Greenough, infra.*" *Smith v. Haynsworth*, at 436 n. 4, 472 S.E.2d at 613 n. 4. The Court also cautioned:

> The failure to comply with the RPC should not, however, be considered as evidence of negligence *per se*. It is merely a circumstance that, along with other facts and circumstances, may be considered in determining whether the attorney acted with reasonable care in fulfilling his legal duties to a client.

Id., at 437 n. 6, 472 S.E.2d at 614 n. 6. *See, also, Spence v. Wingate*, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011) (rejecting argument by lawyer that duties owed to former client are limited to those set forth in Rule 1.9, RPC, and adding "A review of the Scope of

Rule 407, SCACR clearly indicates that the rules are intended for guidance and disciplinary purposes, not to form the basis for civil litigation.")

Note that the Court has determined that the legal profession is not exempt from liability under the Unfair Trade Practices Act under the "regulated industries" exception simply because of the existence of the RPC or other rules governing the behavior of lawyers. *See RFT Management Co., L.L.C., v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 732 S.E.2d 166 (2012). The Court cited favorably to a case out of Alaska, *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1024-25 (Alaska 2009) (holding the legal profession is not exempt from UTPA coverage simply because a state supreme court has the authority to discipline attorneys for misconduct as the Rules of Civil Procedure and the Rules of Professional Conduct are not the type of ongoing, careful regulation required to trigger an exemption; the court concluded "that the attorney disciplinary system and consumer protection laws can coexist as long as the legislature does not purport to take away this court's exclusive power to admit, suspend, discipline, or disbar" attorneys). *RFT*, at 338-339, 732 S.E.2d at 174.

Finally, keep in mind that our courts recognize that lawyers are not subject to strict liability for their behavior. As the Court in *Harris Teeter* explained:

> The practice of law is not an exact science. The practice of law involves the exercise of judgment based on the circumstances known and reasonably ascertainable at the time the judgment is rendered. "[A] lawyer shall exercise independent professional judgment and render candid advice." Rule 2.1, RPC, Rule 407, SCACR. The Rules of Professional Conduct are replete with the recognition that a lawyer cannot pursue every issue that arises in a case while effectively representing his or her client. To the contrary, the Rules recognize that in order to provide a client the best and most competent representation, a

> lawyer has the professional discretion to make a judgment call as to which legal theories are the strongest and will best serve the client's interest. *See* Rule 1.3, cmt. 1, RPC, Rule 407, SCACR ("A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued."); *Hudson v. Windholz*, 202 Ga.App. 882, 416 S.E.2d 120, 124 (1992) (recognizing that "the tactical decisions made during the course of litigation require, by their nature, that the attorney be given a great deal of discretion").

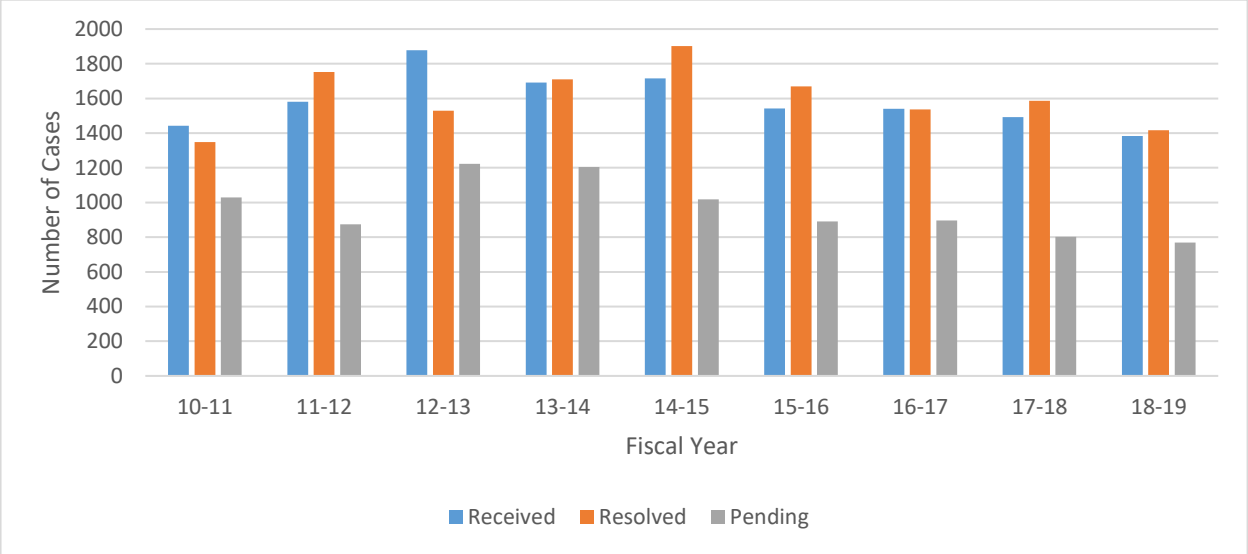
Harris Teeter, Inc. v. Moore & Van Allen, PLLC, at 292-293, 701 S.E.2d at 751.

STATISTICS

ANNUAL REPORT OF LAWYER DISCIPLINE IN SOUTH CAROLINA

2018-2019

COMPLAINTS PENDING & RECEIVED		
Complaints Pending June 30, 2018	**802**	
Complaints Received July 1, 2018 - June 30, 2019	**1384**	
Total Complaints Pending and Received		**2186**
DISPOSITION OF COMPLAINTS		
Dismissed		
By Disciplinary Counsel after initial review	328	
By Disciplinary Counsel after investigation	824	
By Investigative Panel	74	
By Supreme Court	0	
Total Dismissed		1226
Not Dismissed		
Referred to Other Agency	1	
Closed But Not Dismissed	9	
Closed Due to Death of Lawyer	2	
Deferred Discipline Agreement	1	
Letter of Caution	100	
Admonition	9	
Public Reprimand	22	
Suspension	26	
Disbarment	12	
Bar to Future Admission/Debarment (out-of-state lawyer)	3	
Permanent Resignation in Lieu of Discipline	4	
Total Not Dismissed		191
Total Complaints Resolved		**1417**
Total Complaints Pending as of June 30, 2019		**769**


2000
1800
1600
1400
1200
1000
800
600
400
200
0
Number of Cases
10-11
11-12
12-13
13-14
14-15
15-16
16-17
17-18
18-19
Fiscal Year
Received
Resolved
Pending

Practice Type

Law firm	43.93%	**Less than 1%**
Solo practice	24.64%	Corporate/general counsel
Public defender	20.09%	Guardian *ad litem*
Prosecutor	7.23%	Mediator/arbitrator/commissioner
Other government	1.16%	Not practicing
Unknown	1.16%	Department of Social Services
		Law Clerk

Sources of Complaints

		Less than 1%
Client	61.42%	Anonymous
Opposing Party	16.91%	Disciplinary Counsel
Bank	5.13%	Employee
Family/Friend of Client	4.55%	Family/Friend of Opposing Party
Attorney	3.68%	Family/Friend of Witness/Victim/Ward
Sel-Report	1.45%	Family/Friend/Business Assoc. of Lawyer
Court Rptr./Med.Prov./3d Party Payee	1.01%	Judge
Citizen	1.01%	Litigant (ADR/Regulatory)
		Litigation Witness/Victim/Ward
		Prospective Client
		Public Official/Agency/Law Enforcement
		Receiver
		Resolution of Fee Disputes Board
		Unknown

Case Type

Criminal	44.81%	
Domestic	12.36%	**Less than 1%**
Personal Injury/Property Damage	8.60%	Corporate/Commercial/Business
Probate/Estate Planning	6.00%	Homeowners Association
Real Estate	5.78%	Immigration
Not Client Related	3.25%	Intellectual Property
Post Conviction Relief	2.96%	Landlord/Tenant
Property/Contract Dispute	2.60%	Other Case Type
Debt Collection/Foreclosure	2.31%	Professional Malpractice
General Civil	1.52%	Regulatory/Zoning/Licensing
Bankruptcy	1.37%	Social Security/Federal Benefits
Workers' Compensation	1.16%	Tax
Employment	1.01%	Unknown

Alleged Misconduct

Neglect/Lack of Diligence	30.49%	
Dishonesty/Deceit/Misrepresentation	20.45%	
Inadequate Communication	17.05%	**Less than 1%**
Trust Account Misconduct	6.79%	Advertising Misconduct
Lack of Competence	4.34%	Bar Admissions/Disciplinary Matter
Fees	2.82%	Business Transactions
Conflict of Interest	2.53%	Confidentiality
Failure to Deliver Client File	2.17%	Discovery Abuse
Civility	1.81%	Ex Parte Communication
Unauthorized Practice	1.73%	Failure to Pay Fee Dispute
Declining/Terminating Representation	1.37%	Other Conduct
Failure to Pay Third Party	1.30%	Real Estate Conduct
Criminal Conduct (personal)	1.23%	Sexual Conduct (Noncriminal)
Other Litigation Misconduct	1.08%	Supervision
Scope of Representation	1.01%	Unknown

SUBSTANCE ABUSE/MENTAL HEALTH

In the 2018-2019 fiscal year, ODC concluded 20 complaints in which substance abuse or mental health issues were brought to the attention of ODC. Those complaints represented a total of 14 lawyers. Of the complaints concluded that involved substance abuse or mental health issues, 65.00% resulted in some form of discipline against the lawyer. This is compared to an overall discipline rate of 12.63%. Issues included:

Alcohol Related: 5 lawyers

Illegal Drugs: 3 lawyers

Depression: 2 lawyers

Bipolar: 3 lawyers

PTSD: 1 lawyer

Other: 1 lawyer

For more information on current national statistics, trends and recommendations regarding these issues, see the report of the ABA National Task Force on Lawyer Well-Being (Aug.2017) at https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFI NAL.pdf. See also Krill, Patrick R., *et al*., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, Jour. of Addiction Med., Vol. 10, Issue 1, pp. 46-52 (Jan./Feb.2016).

UNLICENSED* LAWYER COMPLAINTS

In the 2018-2019 fiscal year, ODC concluded 21 complaints against 20 unlicensed lawyers. Of the complaints concluded involving unlicensed lawyers, 33.33% resulted in some form of discipline against the lawyer. This is compared to an overall discipline rate of 12.63%. Home jurisdictions of unlicensed lawyers included:

Florida 11

California 6

New York 2

Maryland 1

*An unlicensed lawyer is a lawyer not licensed in South Carolina, but admitted in another jurisdiction.

ATTORNEY TO ASSIST ASSIGNMENTS

Complaints Assigned to ATAs	0
Reports Filed by ATAs	0
Outstanding ATA Reports	0

COMMISSION ON LAWYER CONDUCT

COMMISSION PROCEEDINGS

Meetings of Investigative Panels	6
Formal Charges Filed	5
Formal Charges Hearings	4
Incapacity Proceedings	0
Meetings of Full Commission	1

REQUESTS FOR DISMISSAL REVIEW

Requests for Review by Complainant	109
Dismissal Affirmed by Panel	(109)
Letters of Caution Issued by Panel	0
Case Remanded for Further Investigation	0
Dismissal Review Pending	10

RECEIVER APPOINTMENTS

Pending as of June 30, 2018	13
New Appointments	+13
Appointments Terminated	(16)

SPECIAL RECEIVER/ATP APPOINTMENTS

Serving as of June 30, 2018	0
Appointed	0
Discharged	(0)

Pending as of June 30, 2019	10	Serving as of June 30, 2019	0

LAWYERS BEING MONITORED

New Monitor Files Opened	38*
Lawyers Currently Monitored	116

*includes 4 conditional admissions and 5 conditional reinstatements

SUPREME COURT OF SOUTH CAROLINA

DISCIPLINARY ORDERS*	
Dismissal	0
Closed but Not Dismissed	1
Letter of Caution	0
Admonition	3
Public Reprimand	2
Definite Suspension	10
Disbarment	2
Debarrment (Bar to Future Admission)	2
Resignation in Lieu of Discipline	2
Transfer to Incapacity Inactive	1
Interim Suspension	10

*These figures represent the number of orders issued by the Supreme Court, not the number of complaints. Some orders conclude multiple complaints.

COMPLAINTS REFERRED TO SUPREME COURT:	
Complaints resolved	60
Pending as of June 30, 2019	8